

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

ORIGINAL

77-4057

BRIEF FOR INTERVENOR SOUTHERN PACIFIC COMMUNICATIONS COMPANY

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 77-4057, 77-4067, 77-4068, 77-4073, 77-4074, 77-4075

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
INTERNATIONAL BUSINESS MACHINES CORPORATION,
SECURITIES INDUSTRY AUTOMATION CORPORATION,
UNITED SYSTEM SERVICE, INC.,
AERONAUTICAL RADIO, INC.,
AIR TRANSPORT ASSOCIATION OF AMERICA, and
TELENET COMMUNICATIONS CORPORATION,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and THE UNITED STATES OF AMERICA,
Respondents,

MCI TELECOMMUNICATIONS CORPORATION,
SOUTHERN PACIFIC COMMUNICATIONS COMPANY,
et al.,
Intervenors.

On Petitions for Review of Orders of the
Federal Communications Commission

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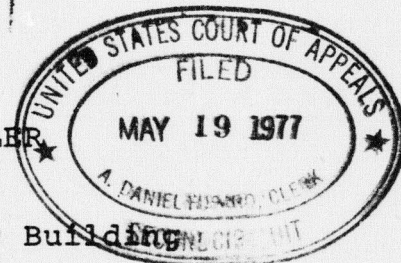


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BRIEF FOR INTERVENOR SOUTHERN PACIFIC COMMUNICATIONS COMPANY
PRELIMINARY STATEMENT: REFERENCES TO RULINGS

The proceeding under review was instituted by a
Notice of Inquiry and Proposed Rulemaking of the Federal
Communications Commission (the FCC) in American Trucking
Associations, Inc. v. American Telephone and Telegraph
Company (AT&T), Docket No. 19746,^{1/} as modified by a Memorandum

^{1/} 47 F.C.C. 2d 644 (1974) (J.A.12) ("J.A." references are
to pages of the Joint Appendix).

Opinion and Order in Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities,
Docket No. 20097.^{2/}

Petitioners seek review of a Report and Order of the FCC en banc in Docket No. 20097 (by Chairman Wiley and Commissioners Washburn, Reid, and Quello, with Commissioner Lee issuing a separate statement, Commissioner Hooks concurring and issuing a statement, and Commissioner Robinson concurring in part and dissenting in part and issuing a statement),^{3/} and a Memorandum Opinion and Order of the FCC en banc on reconsideration (by Chairman Wiley and Commissioners Washburn, Fogarty, and White, with Commissioners Hooks and Quello concurring in the result).^{4/}

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW^{5/}

The issue presented for review is:

Whether the FCC acted properly within the scope of its jurisdiction and discretion in ruling (1) that an entity engaged in the resale of communications common carrier services is a common carrier fully subject to the provisions of Title II of the Communications Act of 1934, as amended,^{6/} and (2) that it should be regulated no

^{2/} 48 F.C.C.2d 1077 (1974).

^{3/} 60 F.C.C.2d 261 (1976) (J.A.28).

^{4/} 62 F.C.C.2d 588 (1977) (J.A.152).

^{5/} This brief is addressed to matters raised in the brief of petitioner International Business Machines Corporation (IBM).

^{6/} 47 U.S.C. §§201 et seq.

differently than any other common carrier, except for the allowance of open entry into the market for resale services.

STATUTE INVOLVED

Communications Act of 1934, as amended, §§151 et seq.:

Section 1, 47 U.S.C. § 151:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

Sections 3(a), (b), (d), (h), 47 U.S.C. §§153(a), (b), (d), (h):

(a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(b) "Radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

* * * * *

(d) "Transmission of energy by radio" or "radio transmission of energy" includes both such transmission and all instrumentalities, facilities, and services incidental to such transmission.

* * * * *

(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act. * * *

Section 4(i), (j), 47 U.S.C. § 154(i), (j):

(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

* * * * *

(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.* * *

TITLE II-COMMON CARRIERS

§ 201, 47 U.S.C. § 201:

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the

public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful: Provided, That communications by wire or radio subject to this Act may be classified into day, night, repeated, unrepeatd, letter, commercial, press, Government and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications. * * * *

The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provision of this Act.

Section 202(a), 47 U.S.C. § 202(a):

(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

Section 214(a), 47 U.S.C. § 214(a):

(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present

or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line. * * * *

No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section.

COUNTERSTATEMENT OF THE CASE

In the orders under review, the FCC has ruled that the unlimited resale and sharing of all communications common carrier services other than monopoly services is just and reasonable, and that tariff provisions of communications common carriers which prevent or restrict such practices are unjust, unreasonable, and unlawful. Accordingly, the FCC has prescribed unlimited resale and sharing of private line services as just and reasonable. ^{7/}

IBM has petitioned for review of that part of the Commission's Report and Order which holds that the resale of communications service is a common carrier activity and that

7/ 60 F.C.C.2d at 321(J.A.109).

entities engaging in resale are fully subject to the provisions of Title II of the Communications Act^{8/} (IBM Brief, pp. 5-6). This brief of Southern Pacific Communications Company as an intervenor is addressed to the matters raised in the brief of IBM.

The Proceeding Before the FCC

This proceeding was initiated on the basis of a complaint by the American Trucking Associations, Inc., alleging that restrictions on the resale and sharing of communications services in the tariffs of AT&T were unjust, unreasonable, and discriminatory, and therefore unlawful. The inquiry was broadened by a Notice of Inquiry and Proposed Rulemaking into a general investigation into the lawfulness of restrictions on the resale and sharing of communications services other than the monopoly services (MTS and WATS) appearing in the tariffs of communications common carriers.^{9/} Three rounds of written pleadings, consisting of comments, replies, and responses to the replies were filed by various parties, including SPCC.

On July 5, 1974, the FCC issued a Report and Order holding generally that restrictions on resale and sharing of communications services offered by common carriers other than MTS and WATS were unlawful.^{10/} On reconsideration, the FCC modified its ruling with respect to its earlier requirement

^{8/} Ibid.

^{9/} 47 F.C.C.2d 644 (1974) (J.A.12), 48 F.C.C.2d 1077 (1974).

^{10/} 60 F.C.C.2d 261 (1976) (J.A.28).

that underlying carriers providing basic monopoly services must establish separate, arms-length subsidiaries to engage in resale or related activities of other communications services, and reinstated the restrictions on the resale and sharing of international communications services, but otherwise adhered to its previous rulings.^{11/}

Petitions for review addressed to various portions of the Commission's orders were filed by AT&T, IBM, Securities Industry Automation Corporation, United System Service, Inc., the airline industry (Aeronautical Radio, Inc., and Air Transport Association of America), and Telenet Communications Corporation. The cases have been consolidated by this Court. Earlier petitions for review filed by international record carriers (ITT World Communications, Inc., and RCA Global Communications) and by The Western Union Telegraph Company have been dismissed, and a motion for stay by AT&T was denied by this Court on March 22, 1977. The proceeding is before the Court on an abbreviated briefing schedule and a stipulation for the filing of a deferred appendix.

The Commission's Orders on Resale

IBM's brief is addressed to the FCC's orders requiring entities which engage in resale to comply with the common carrier requirements of Title II of the Communications Act,

^{11/} 62 F.C.C.2d 588 (1977) (J.A.152).

except for the removal of restrictions on open entry into the resale market. Resale is defined by the FCC as the subscription to communications services and facilities by one entity and the reoffering of communications services and facilities to the public (with or without "adding value") for profit.^{12/} The FCC determined that elimination of the restrictions on unlimited resale and sharing of private line service would bring about substantial public benefits, including the following:^{13/}

- (a) the provision of communications service at rates more closely related to costs;
- (b) better management of communications networks, and the provision of management expertise by users and intermediaries to the carriers;
- (c) the avoidance of waste of communications capacity; and,
- (d) the creation of additional incentives for research and development of ancillary devices to be used with transmission lines.

The FCC recognized two forms of resale, viz. brokerage and processing.^{14/} (the IBM brief, p.8, describes only brokerage). The broker never physically controls the utilization of a communications facility or service provided by the underlying carrier, but merely acts as an intermediary or middleman between the underlying carrier and an end user, who ultimately controls the utilization of the communications

^{12/} 60 F.C.C.2d at 263 (J.A.31), 271 (J.A.41).

^{13/} 60 F.C.C.2d at 265 (J.A.33). See 60 F.C.C.2d at 298-303 (J.A.78-83).

^{14/} 60 F.C.C.2d at 272 (J.A.42).

facility or service subscribed to by the broker.^{15/}

Unlike the broker, the resale processor retains continuous control over the utilization of services and facilities furnished by the underlying carriers. The fundamental offering of the communications carrier is supplemented by other facilities and services, and the resulting package, which includes a resold communications service, is offered to the public.^{16/} The supplemental services offered by the resale processor include the combination of computers with communications private lines; the resale of lower bandwidth, or lower data speed circuits, derived from higher bandwidth through multiplexer equipment; technological applications such as packet switching and facsimile communications; and the mixture of communications and non-computer processing, such as the system used by the trucking industry for the procurement and communication of permits, documents, and money orders.^{17/} The resale processor differs from the broker not only because it physically controls the underlying carrier's services and facilities, but also because it may incur substantial costs for additional facilities and operations in providing the supplemented services.^{18/}

^{15/} 60 F.C.C.2d at 272 (J.A.42-43).

^{16/} 60 F.C.C.2d at 272 (J.A.43).

^{17/} 60 F.C.C.2d at 272-274 (J.A.42-46).

^{18/} 60 F.C.C.2d at 274 (J.A.45).

The FCC anticipated that as a result of its ruling ^{19/} two tiers would develop in the communications industry:

We foresee expanded resale and sharing as resulting in the future development of a two-tiered interstate telecommunications industry and market structure. The first tier will be comprised of carriers offering basic communications channels and switching services in two markets--to the public at the "retail" level, and to other common carriers and resale carriers at the "whole-sale" level. The second tier will be comprised of carriers and other entities leasing the preponderance of their communications plant from the first tier carriers for the ultimate purpose of reselling these to the public sector--either directly in the form of point-to-point communications channels, or implicitly, when these channels and switching facilities are combined to form a switched private line data or voice communications service, or a communications based data processing service.

The second tier carrier would serve a broad spectrum of market activity, including (a) private line data and voice switching, (b) resale and point-to-point circuits derived by multiplex equipment from a leased circuit, (c) resale of private line circuits obtained from any bulk rate offerings of first tier carriers, (d) brokerage of first

^{19/} 60 F.C.C.2d at 300 (J.A. 80) (footnote omitted).

tier private line service offerings, and (e) hybrid communications.^{20/} "In short," the FCC said, "we see a potential merging, in whole or in part, of the resale, specialized carrier and data processing industries into a highly competitive 'information handling' industry, employing a combination of wholly-owned facilities, customer-provided facilities, and services and facilities provided by the underlying carrier."^{21/}

The FCC gave considerable attention in its Report and Order to the question of the extent, if any, to which it could and should regulate entities engaged in resale. In its Notice of Inquiry and Proposed Rulemaking, the FCC had noted that, entirely separate from the issues whether unlimited resale and sharing should be prescribed, was its consideration of the extent to which entities proposing to resell services should be regulated by the FCC, and observed:^{22/}

We consider issues relating to the manner in which resale entities should be regulated to be as significant to the established carriers and to the public as are the basic questions concerning the availability of facilities for resale or shared use purposes.

The Commission declared that it did not have sufficient information to determine whether particular resale services were subject to its broad regulatory jurisdiction, and stated:^{23/}

^{20/} 60 F.C.C.2d at 301 (J.A.81).

^{21/} Ibid.

^{22/} 47 F.C.C.2d at 654 (J.A.22).

^{23/} Ibid.

We recognize * * * that the public interest may not require such full assertion of regulatory jurisdiction as is exercised over the established carriers which own and operate their own lines of communication. Therefore we believe the best approach to jurisdictional questions is to examine, without regard to the actual limits of our present jurisdiction, the extent to which this Commission ought to regulate the various forms of resale and sharing entities. At that point we can determine if we presently have sufficient legal authority to assert any regulatory jurisdiction we find to be desirable. To the extent that we find the public interest would be served by regulation that is not authorized by law, we can thereupon recommend any necessary legislative changes.

It included among the issues which the parties in ^{24/} the proceeding were requested to address specifically:

How should the Commission regulate the entities reselling communications services and facilities? If in some instances full regulation would not be desirable recommend the manner and extent to which regulation is desirable. Specifically consider the most desirable manner of rate regulation for the various types of resale entities. For such entities would the setting of rates on the basis of operating ratios rather than rate base-rate of return be more effective? What accounting system and financial reporting should be required? What regulation over commencement of operation, standards of service and termination of service is desirable?

In its Report and Order, the FCC summarized its conclusions that resale is and should be subject to its ^{25/} common carrier regulation:

We have also considered the extent to which we have jurisdiction over resale and sharing activities which exist and may reasonably be expected as a result of our decision. We find that an entity engaged in the resale of communications service is a common

^{24/} 47 F.C.C.2d at 657 (J.A.25).

^{25/} 60 F.C.C.2d at 263-64 (J.A.31).

carrier, and is fully subject to the provisions of Title II of the Communications Act. We have considered and rejected arguments that (a) resellers are not engaged in common carriage under the Act and thus are not subject to our jurisdiction, and (b) we should exercise jurisdiction over resale entities only reasonably ancillary to our regulation of common carriers. * * *

Finally, we have considered the manner in which resale carriers should be regulated under Title II of the Act, and what degree of supervision, if any, we should exercise over sharing arrangements. We find that with one exception, there is no reason to regulate a resale common carrier any differently than any other common carrier. The exception is that we find the public interest will be served by allowing open entry into the market for resale services, and thus we do not require a special showing of public need for the particular service being proposed as a condition of certification. Otherwise, we reject suggestions which would establish a "relaxed" regulation of the rates and practices of resale carriers, or which would provide for reporting requirements different from those now in our regulations.

Parties responding to the Notice had been virtually unanimous in presuming that the resale of communications service was common carriage subject to Title II of the Communications Act.^{26/} Reply comments by the Office of Telecommunications Policy (OTP) that resale is not subject to common carrier regulation were fully considered and discussed by the FCC, which concluded that the history of ICC regulation of freight forwarders did not preclude the FCC from determining that resellers are engaged in interstate communication by wire and radio; that it could perceive no difference between resale and traditional

communications common carriage; that whether a carrier owned or leased facilities was not of regulatory significance; that the FCC would not permit resellers to operate in a discriminatory fashion; and that if later experience showed that the public interest would be served by deregulation, it would act accordingly to the extent allowed by law.^{27/}

Having determined that the resale of communications services is a common carrier activity, the FCC then examined how it should regulate the entities engaged in resale. It concluded that it should adopt an open entry policy whereby entities engaged in resale would be granted certification without being required to submit (a) a specific showing of a special public need for the particular service, (b) a showing that the proposed service was unique, was not available, or "adds value", or (c) a showing and assessment of the economic impact of their entry into the market.^{28/} In all other respects, the Commission concluded that "there is no reason to regulate a resale common carrier any differently than any other common carrier,"^{29/} including compliance with the requirements that the applicants seeking certification establish that they are legally, technically, financially, and otherwise qualified

^{27/} 60 F.C.C.2d at 303-308 (J.A.84-92).

^{28/} 60 F.C.C.2d at 308-312 (J.A.93-96).

^{29/} 60 F.C.C.2d at 265 (J.A.33).

to provide the service; that they secure authorization under Section 214 to provide the service, to add multiplexing equipment, and, where sought, to discontinue service; that they be subject to rate regulation requiring rates to be just and reasonable and prohibiting unjust or unreasonable discrimination; that they be subject to the FCC's substantive rules for tariff filings; and that they be generally regulated in basically the same manner as other common carriers.^{30/}

Contrary to the assertion in IBM's brief (p. 11) that the Commission held, "on the premise that resellers are common carriers, that the Commission is legally compelled to subject them to much of the certification and rate regulation prescribed for interstate communications common carriers by Title II of the Communications Act," in fact the Commission considered carefully, deliberately, and at length not only whether resale is subject to its jurisdiction, but also whether, and to what extent, it should exercise that jurisdiction, concluding that in some matters it should exercise that jurisdiction and in other matters it should not impose regulatory requirements.^{31/}

The IBM brief thus is premised upon a basic faulty hypothesis that once the FCC concluded that the resellers were subject to Title II of the Communications Act as common carriers,

^{30/} 60 F.C.C.2d at 312-316 (J.A.97-101).

^{31/} 60 F.C.C.2d at 308-316 (J.A. 93-101).

the FCC proceeded on the assumption that it had no power to forbear from imposing on the resellers the complete regulatory requirements of Title II of the Act. To the contrary, it is submitted that it is clear from the Report and Order itself that the Commission recognized that the statute imposed obligations and restraints on common carriers, but it also determined seriatim whether adequate reason had been presented from exempting resellers from any requirements for common carrier certification and operation.

Commissioner Robinson, dissenting, argued that the FCC's approach was "unduly mechanical" and "formalistic" and not compelled either by law or still less by economic policy, and difficult to reconcile with other cases where it did exercise forbearance. ^{32/}

Interest of SPCC as an Intervenor

SPCC was organized in 1970 in order to engage in the business of furnishing specialized communications common carrier services. It first went into operation in December, 1973, and by June, 1974, became the first specialized carrier to provide coast-to-coast terrestrial specialized communications services. It is the licensee and permittee of more than 200 fixed point-to-point microwave radio stations in the domestic public radio service authorized by the FCC. Through additional construction, leasing, and ^{32/} 60 F.C.C.2d at 337-341 (J.A. 144-148).

interconnection SPCC provides service to an increasing number of cities and states as its system expands.

SPCC provides specialized communications services oriented to meet the particular needs of business, industry, government, and educational entities, with individualized facilities tailored to the requirements of subscribers to insure flexibility and economy. Communications channels are designed to provide for the transmission of data, facsimile, telemetering control, alarm, paging, and voice. In addition, wideband facilities can be provided to handle extremely high speed data transmission or video, as required. Service is provided by a sophisticated microwave system, employing the most recent solid technology in order to maximize performance and reliability and to minimize downtime.

SPCC has constructed and placed into operation an extensive communications network in reliance upon the charter authorizing open entry to qualified carriers in the specialized communications field granted by the FCC in 1971 in the Specialized Common Carrier Inquiry.^{33/} An essential

^{33/} 29 F.C.C.2d 870, 920, (1971), recon. denied, 31 F.C.C.2d 1106 (1971), affirmed, Washington Utilities & Transportation Commission v. FCC, 513 F.2d 1142 (9th Cir. 1975), cert. denied, National Assn. of Regulatory Utility Commissioners v. FCC, 423 U.S. 836 (1975).

element of the FCC's decision was the stress emphasized by the Commission upon its ^{34/}

objective to promote and maintain an environment within which existing and any new carriers shall have an opportunity to compete fairly and fully in the sale of specialized services. Our rate-making and regulatory policies and practices will be appropriately adapted to accomplish this objective.

SPCC is to some extent engaged in the resale of communications services, since it leases some circuits from other carriers for service to its customers as well as providing circuits to customers over its own routes. It is a fully subject and regulated carrier under the Communications Act and the Commission's Rules and Regulations. It is SPCC's position that it would be adversely affected, and competition would be neither full nor fair, if it remains fully regulated by the Commission as a common carrier while other entities engaged in resale with which SPCC competes are not equally regulated by the FCC.

34/ 29 F.C.C.2d at 915.

SUMMARY OF ARGUMENT

I.

The FCC properly concluded that an entity engaged in the resale to the public of communications services or facilities secured from a communications common carrier is itself a communications common carrier fully subject to the FCC's jurisdiction under Title II of the Communications Act. In its relationship to the public, a reseller is engaged and involved in the transmission of telecommunications intelligence by wire, radio, and other like connection between points of origin and reception, including the instrumentalities, facilities, apparatus, and services incidental to such transmission. ICC cases holding that freight forwarders are not common carriers in their relationship to railroads are not inconsistent with common law principles, applicable here by analogy, that freight forwarders are common carriers in their relationship to the public. Common carrier status depends upon the nature and extent of the undertaking, rather than upon the ownership and operation of the means of transmission.

The FCC's decision to subject entities engaged in the resale of communication service to common carrier regulation ensures that they will provide communication service

as required to meet the public convenience and necessity, at rates which are just and reasonable and not discriminatory. It thereby serves not to diminish but to fulfill the FCC's statutory mandate "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges". ^{35/}

II.

The FCC did not conclude that, because entities engaged in resale are subject to its jurisdiction as common carriers, it was without power to forbear from imposing various Title II regulatory controls on resellers, as averred by IBM (p. 15). To the contrary, the FCC closely examined the various incidents of regulation individually in determining the extent to which it should, under a standard of the public interest, exercise its power to regulate resellers as common carriers. Its conclusion that it should permit open entry without requiring a showing of need, added value, or economic impact, or defining a required minimum quality of service, but with adherence to certification and

^{35/} Section 1 of the Communications Act of 1934, as amended, 47 U.S.C. § 151.

rate and tariff requirements, thus constituted the exercise of a reasoned, informed discretion, not the application of a misapprehension by the FCC of its power to forbear.

ARGUMENT

Introduction

In the Report and Order under review, the Commission held that public benefits would flow from competition in the resale and sharing of communications services,^{36/} but it is believed that the text does not support IBM's assertion (p. 16) that the FCC found that the resale field "will not be susceptible to monopoly or other anticompetitive practices". If competition were self-enforcing, there would be no need of the Sherman Act or the Federal Trade Commission Act. To the contrary, the FCC recognized the need for regulation despite open entry, for it admonished the resellers in the pages cited that any opposition by them to the institution by an underlying carrier of technological improvements would be subject to FCC review.^{37/} That the FCC relaxed to some extent its certification requirements relating to open entry^{38/} (but not exit,^{39/} as IBM asserts,

^{36/} 60 F.C.C.2d at 298-303 (J.A. 78-84).

^{37/} 60 F.C.C.2d at 302 (J.A. 82).

^{38/} 60 F.C.C.2d at 309-312 (J.A. 93-96).

^{39/} 60 F.C.C.2d at 312-313 (J.A. 98).

p. 16) demonstrates the exercise of a sound discretion by the FCC in the application of its regulatory authority.

IBM asserts (pp. 16-17), without citing authority (for there is none), that there is no reason why the FCC should regulate both the rates of the underlying carriers and of the resellers. There is no reason why it should not. To the contrary, it is at least as important to protect the public against the retailer as it is to protect the retailer from the wholesaler. Whatever reasons exist to regulate private line carriers--which are also characterized by both competition through open entry as well as carrier regulation--^{40/} also apply to the regulation of resellers. The reality of the economic world is much more reflected in the "imperfect competition" of Joan Robinson^{41/} or in the "monopolistic competition" of Edward Hastings Chamberlin^{42/} than in the theory of perfect competition of David Ricardo.^{43/}

Thus, competition with regulation may often be the most appropriate condition. Mr. Justice Frankfurter has

^{40/} Specialized Common Carrier Inquiry, note 34 supra.

^{41/} Robinson, The Economics of Imperfect Competition (1933).

^{42/} Chamberlin, The Theory of Monopolistic Competition (1933).

^{43/} Ricardo, Principles of Political Economy and Taxation (1817).

said in the landmark Three Circuits case:

That there is a national policy favoring competition cannot be maintained today without careful qualification. It is only in a blunt, undiscriminating sense that we speak of competition as an ultimate good. Certainly, even in those areas of economic activity where the play of private forces has been subjected only to the negative prohibitions of the Sherman Law, this Court has not held that competition is an absolute. [citations].

Prohibitory legislation like the Sherman Law, defining the area within which "competition" may have full play, of course loses its effectiveness as the practical limitations increase; as such considerations severely limit the number of separate enterprises that can efficiently, or conveniently, exist, the need for careful qualification of the scope of competition becomes manifest. * * *

Of course, the fact that there is substantial regulation does not preclude the regulatory agency from drawing on competition for complementary or auxiliary support. Satisfactory accommodation of the peculiarities of individual industries to the demands of the public interest necessarily requires in each case a blend of private forces and public intervention.

IBM's brief is inaccurate in asserting that the FCC found it unnecessary to weigh the considerations for waiving certification and rate controls because of its view that it was legally foreclosed from considering them, and that it did not consider itself free from relaxing regulatory

44/ FCC v. RCA Communications, Inc., 346 U.S. 86, 91-94 (1953).

requirements other than open entry (p. 17 and fn. 30). The Report and Order shows on its face that the FCC gave careful consideration not only to the question whether it possessed jurisdiction (which it properly found it did), ^{45/} but also whether in the public interest it should exercise that jurisdiction (which it found it should in some respects, and not in some other respects). ^{46/}

I. The FCC Properly Held That an Entity Engaged in the Resale to the Public of Communications Services and Facilities Secured From a Communications Common Carrier Is Itself a Communications Common Carrier Fully Subject to Title II of the Communications Act

In a belated transmittal and comments which may not even have been properly before the FCC, ^{47/} the Office of Telecommunications Policy (OTP) argued that entities engaged in resale are not common carriers and therefore not subject to regulation under Title II of the Communications Act, and that as a matter of policy they should be free from such regulation (J.A. 1089-1143). The Department of Justice only argued that as a matter of policy they should not be subject to full common carrier regulation (J.A. 1430-1438)

^{45/} 60 F.C.C.2d at 303-308 (J.A.84-92).

^{46/} 60 F.C.C.2d at 308-316 (J.A.93-101).

^{47/} See AT&T brief in chief filed April 18, 1977, type-written copy pp. 5-6 fn. 4.

(contrary to the implication of IBM's brief, p. 18, that the Department of Justice argued that they are not communications carriers). The FCC did not conclude that resellers are subject "to much of the certification and rate regulation scheme of Title II" (IBM brief, p. 18), but that they are fully subject to Title II, but for policy reasons they would be permitted open entry into the market.^{48/} In a three-page petition (J.A.1545-1547), IBM sought reconsideration of the FCC's Report and Order on the ground that it appeared to subject to common carrier regulation heretofore unregulated entities which use private line communication service in aid of their primary business (although admittedly this was not clear), and that this would overturn the FCC's decision in the Computer Inquiry^{49/} that it was undesirable to regulate companies that provide communications-based data processing services.

For the first time on appeal, IBM raises a new contention not heretofore presented to the FCC, not that entities engaged in resale of communications services are not common carriers (which was fully considered by the FCC

^{48/} 60 F.C.C.2d at 303-316 (J.A.84-101).

^{49/} 28 F.C.C.2d 291 (1970), 28 F.C.C.2d 267 (1971), affirmed in part, reversed in part, GTE Service Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973), on remand, 40 F.C.C.2d 293 (1973).

in responding to OTP), ^{50/} but that, assuming arguendo they are common carriers, they are not actually engaged in transmitting messages or data by wire or radio, or in radio transmission of energy (IBM brief, pp. 20-22). Section 405 of the Communications Act of 1934, as amended, ^{51/} provides in pertinent part:

The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such order, decision, report or action, except where the party seeking such review *** relies on questions of fact or law upon which the Commission *** has been afforded no opportunity to pass.

Since this contention was not previously before the FCC, so that it has had no opportunity to pass on this novel proposition, it is not properly before the Court.

In any event, the insubstantial nature of this argument may be recognized in the failure of any of the many parties filing pleadings before the FCC to have suggested this argument. Clearly, a party need not physically transmit a message between points of origin and reception to be a participant engaged in the transmission. Certainly it depreciates the plain meaning of words to state that an entity engaged in the resale of communications services is not engaged in communication, "including all instrumentalities,

^{50/} 60 F.C.C.2d at 303-308 (J.A.84-92).
^{51/} 47 U.S.C. § 405.

facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." ^{52/} As the FCC has said, reviewing the authorities with respect to transportation, "common carrier status under common law depends upon the nature and extent of the undertaking rather than upon ownership or operation of the means of transportation." ^{53/}

Since 1938 the FCC has held that a party making a public offering of communications service for hire cannot escape the regulatory power of the FCC under the statutory scheme of the Communications Act merely because he leases the existing physical facilities of another carrier and engages in no new construction of his own under Section 214 of the Act. ^{54/} In the Computer Inquiry, the FCC held that where a service provided by a company is oriented essentially to satisfy the communications requirements (e.g., message switching) of a subscriber, even though a data processing feature is an integral part although incidental to the message switching, the entire service will be treated as a communications service for hire. ^{55/} In affirming

^{52/} 47 U.S.C. § 153(a), (b), (h).

^{53/} 60 F.C.C.2d at 305-306 (J.A.88).

^{54/} Mackay Radio and Telegraph Co., 6 F.C.C. 562, 573-74 (1938).

^{55/} Note 50 supra, 28 F.C.C.2d at 305.

this aspect of the FCC's ruling, this Court held that "even absent explicit reference in the statute, the expansive power of the Commission in the electronic communications field includes the jurisdictional authority to regulate carrier activities, in an area as intimately related to the communications industry as that of the computer services, where such activities may substantially affect the efficient provision of reasonably priced communications." ^{56/}

Indeed, the FCC has previously ruled, without substantial objection by any party, that three companies engaged in the processing form of resale, by furnishing a "value added" service in taking channels leased from a communications common carrier and combining them with computers to transmit data or facsimile by a computerized packet store-and-forward system, were communications common carriers for hire within the meaning of Section 3(h) of the Communications Act, and subject therefore to the certification and other applicable requirements of Title II of the Act. ^{57/}

The analogy of freight forwarders now argued by IBM (pp. 22-27) and the decisions cited in support were fully considered by the FCC in its Report and Order when argued by OTP. Contrary to IBM's brief (pp. 22-23), the

^{56/} Note 50 supra, 274 F.2d at 731.

^{57/} Packet Communications, Inc., 43 F.C.C.2d 922, 925 (1973); Graphnet Systems, Inc., 44 F.C.C.2d 800, 801-802 (1974); Telenet Communications Corp., 46 F.C.C.2d 680, 681 (1974).

FCC has not "conceded" in this case that "the operations of freight forwarders are analogous to those of communications resellers," but only that they are helpful in determining the obligations owed by the underlying carriers to freight forwarders in permitting resale. ^{58/} The FCC specifically disagreed with OTP's reading of the freight forwarding precedents and its application of these precedents as circumscribing the FCC's jurisdiction over resale and sharing. ^{59/} As the FCC points out in a careful review of the authorities, the cited ICC cases were concerned with the relationship of railroads to freight forwarders as shippers, not to the regulatory status of freight forwarders under the Interstate Commerce Act in their relationship to the public. ^{60/} Freight forwarders and express companies were held to be common carriers at common law even though they did not generally control the means of transportation; they were not common carriers under the Interstate Commerce Act because prior to 1950 the Congress simply intended to restrict regulation to only one class of transportation common carriers, the railroads, who controlled the means of transportation. ^{61/}

^{58/} 60 F.C.C.2d at 281 (J.A.56).

^{59/} 60 F.C.C.2d at 305 (J.A.87).

^{60/} 60 F.C.C.2d at 305 (J.A.87-88).

^{61/} 60 F.C.C.2d at 306-307 (J.A.88-89).

In any event, the separate status of "freight forwarder", or a distinction between "direct" and "indirect" common carriers, are concepts not known in communications law. While there may be similarities in language between the statutes administered by the Interstate Commerce Commission and the FCC, their functions are of an entirely different nature, so that, in view of the differing demands placed upon the two agencies, the FCC should not be restricted to a course of action which has been dictated by the requirements of the transportation industry.^{62/} A party which buys communications wholesale and sells retail, or otherwise engages in the resale of communications services, is nonetheless engaged in the sale of communications subject to FCC regulation, whether or not the party owns the communications facilities or engages in their physical technical operation in providing the service.

The suggestion in IBM's brief (pp. 28-30) that the FCC's decision regulating resellers is inconsistent with the FCC's statutory mandate "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable

^{62/} General Telephone Co. of Southwest v. United States, 449 F.2d 846, 856 (5th Cir. 1971).

charges", ^{63/} borders on the frivolous. There is no statutory mandate that the FCC must invoke particular ritualistic incantations to give efficacy to its determinations. As the FCC points out, it adopted a policy of open entry in order to permit firms to develop to a point where they can provide services not heretofore available, to promote a significant degree of competition, and to provide cost savings and selectivity as well as technical innovation. At the same time, however, it adopted a certification program in order to secure some assurance that the party engaging in resale would be qualified to provide the service and would not abandon service without prior FCC approval. ^{64/} All these determinations encourage wider service with adequate facilities. At the same time, its imposition of tariff regulations provides assurance that rates will be just and reasonable, and not discriminatory. ^{65/} Clearly, the FCC's actions were taken with full cognizance and in complete response to the basic requirements of the Act.

^{63/} Section 1 of the Communications Act, 47 U.S.C. § 151.

^{64/} 60 F.C.C.2d at 308-313 (J.A.93-99).

^{65/} 60 F.C.C.2d at 313-314 (J.A.99-100).

II. The FCC Did Not Conclude That It Was Without Power to Forbear From Imposing Its Regulatory Controls Over Resale Common Carriers, But Determined Within A Reasoned Discretion to What Extent It Should Impose Regulation on Resellers

It is submitted that it is a complete misreading of the FCC's Report and Order for IBM to aver in its brief (p. 31) that the FCC refused to consider policy questions relating to the desirability of imposing regulatory controls on resellers, and considered itself legally compelled to impose those controls generally.

The FCC began this inquiry with the concept that ^{66/} we believe the best approach to jurisdictional questions is to examine, without regard to the actual limits of our present jurisdiction, the extent to which this Commission ought to regulate the various forms of resale and sharing entities. At that point we can determine if we presently have sufficient legal authority to assert any regulatory jurisdiction we find to be desirable. [Emphasis added].

The specific issue was similarly phrased to reflect a ^{67/} recognition of its power to exercise a sound discretion:

How should the Commission regulate the entities reselling communications services and facilities? If in some instances full regulation would not be desirable recommend the manner and extent to which regulation is desirable. Specifically consider the most desirable manner of rate regulation for the various types of resale entities. For such entities would the setting of rates on the basis of operating ratios rather than rate base-rate of return be more effective? What

^{66/} 47 F.C.C.2d at 654 (J.A.22).

^{67/} 47 F.C.C.2d at 657 (J.A.25).

accounting system and financial reporting should be required? What regulation over commencement of operation, standards of service and termination of service is desirable?
[Emphasis added]

A review of the FCC's Report and Order demonstrates that the FCC did in fact exercise an informed and reasoned discretion in determining what requirements it should waive (e.g., a showing of special need, added value, or economic impact, and a definition of a minimum quality of service, ^{68/} and, on reconsideration, a requirement for maximum separation), ^{69/} and what requirements should be imposed (e.g., certification and prior FCC approval of discontinuance under Section 214, rate regulation, and tariff filings), ^{70/} based on considerations of public interest, not implacable statutory demands.

It is true that the FCC recognizes, as it must, "statutory constraints," and that "[i]t is not sufficient to state that the rates for resale will be just and reasonable because they will be set according to the going market price in a competitive environment. See F.P.C. v. Texaco, Inc., 417 U.S. 380 (1974)." ^{71/} This is a correct reading of the Texaco decision: ^{72/}

^{68/} 60 F.C.C.2d at 308-312, 315 (J.A.93-96, 100).
^{69/} 62 F.C.C.2d at 593-594 (J.A.160).
^{70/} 60 F.C.C.2d at 312-316 (J.A.96-101).
^{71/} 60 F.C.C.2d at 314 (J.A.99).
^{72/} 417 U.S. at 394, 397.

The Commission may have great discretion as to how to insure just and reasonable rates, but it is plain enough to us that the Act does not empower it to exempt small-producer rates from compliance with that standard.

* * * * *

[W]e should also stress that in our view the prevailing price in the marketplace cannot be the final measure of "just and reasonable" rates mandated by the Congress.

This stray collateral citation of Texaco, however, can by no rational reading of the Report and Order be read to support IBM's leap to the conclusion that the FCC thereby and thereupon closed its mind to possible mitigation of the rigors of regulation. Indeed, the record plainly shows that it did not, and that it carefully and individually culled from regulation those incidents which it deemed upon considered judgment were not appropriate for regulation.

Clearly the FCC knew and recognized that it was not foreclosed from the application of regulatory forbearance under appropriate circumstances. Some of the very cases cited by IBM (pp. 33-36) to show the power of the FCC to forbear were cited by the FCC in determining whether it should forbear in evaluating particular regulatory requirements. viz. American Satellite Corp., ^{73/} the Computer Inquiry, ^{74/} and NARUC II. ^{75/} The FCC knew in those

^{73/} 55 F.C.C.2d 1 (1975), cited at 60 F.C.C.2d at 314 (J.A.99).

^{74/} Note 50 supra, cited inter alia at 60 F.C.C.2d at 315 (J.A.100).

^{75/} National Assn. of Regulatory Utility Commissioners v. FCC, 174 U.S.App.D.C. 374, 533 F.2d 601 (1976), cited inter alia at 60 F.C.C.2d at 304 (J.A.86).

cases, as well as in the Philadelphia Television case ^{76/}
cited in the IBM brief (pp. 15, 31, 32, 46) how to forbear
from imposing the maximum sweep of its jurisdiction, and
it similarly knew how to forbear with respect to resale,
as well as sharing. ^{77/}

The inescapable fact is that the regulation of
resale is not an area where public policy favors broad for-
bearance or deregulation. To obtain certification, a
carrier must make an affirmative showing that he will
serve the public convenience and necessity, and that he
possesses the legal qualifications, adequate financial re-
sources, plant, and equipment, and operational experience
necessary to provide an efficient service to the public.
Once certificated, a carrier is further regulated to assure
protection to the public interest, not only in the filing
of reports to enable the FCC to review its operations,
but also in such restraints as the prohibitions against
unjust or unreasonable charges, practices, classifications,
or regulations, ^{78/} against undue discrimination and unlawful

^{76/} Philadelphia Television Broadcasting Co. v. FCC, 123
U.S.App.D.C. 298, 359 F.2d 282 (1966).

^{77/} 60 F.C.C.2d at 316-321 (J.A.102-108).

^{78/} 47 U.S.C. § 201(b).

preference, ^{79/} and against the construction, extension, or discontinuance of lines without prior approval of the FCC. ^{80/} Contrary to the assertions of IBM (see, e.g., p. 29), the FCC's Report and Order imposes no severe, difficult, or unreasonable restraints upon entities seeking to enter the resale market, but is designed to protect the public interest in the continued availability of adequate communications facilities at reasonable charges.

CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, SPCC urges that the Court affirm the Commission's Report and Order in establishing regulatory requirements upon entities proposing to engage in the resale of communications common carrier services.

Respectfully submitted,

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May 18, 1977

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^{79/} 47 U.S.C. § 202(a).

^{80/} 47 U.S.C. § 214(a).

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,	)	
INTERNATIONAL BUSINESS MACHINES CORPORATION,	:	
SECURITIES INDUSTRY AUTOMATION CORPORATION,	)	
UNITED SYSTEM SERVICE, INC.,	:	
AERONAUTICAL RADIO, INC.,	)	
AIR TRANSPORT ASSOCIATION OF AMERICA, and	:	
TELENET COMMUNICATIONS CORPORATION,	)	
	<u>Petitioners,</u>	:
	)	
v.	:	Case Nos. 77-4057
	)	77-4067
FEDERAL COMMUNICATIONS COMMISSION	:	77-4068
and THE UNITED STATES OF AMERICA,	)	77-4073
	<u>Respondents,</u>	:
	)	77-4074
		77-4075
MCI TELECOMMUNICATIONS CORPORATION	:	
SOUTHERN PACIFIC COMMUNICATIONS COMPANY,	)	
et al.,	:	
	<u>Intervenors.</u>	)

CERTIFICATE OF SERVICE

I, Herbert E. Forrest, a member of the Bar of this Court, hereby certify that copies of the "Brief for Intervenor Southern Pacific Communications Company" in the above-referenced consolidated cases were served on this 18th day of May, 1976, by United States mail, postage prepaid, upon the following:

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